Supreme Court, U.S.
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No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1999

UNITED STATES OF AMERICA *EX REL.*
CHANDRA MITTAL, Ph.D.,
Petitioner,

v.

TEXAS SOUTHERN UNIVERSITY;
BARBARA HAYES; ARUN JADHAV, Doctor,
CURTIS W. MCDONALD; JOSEPH JONES,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Eleventh Amendment to the United States Constitution prohibits *qui tam* suits against a state under the False Claims Act, 31 U.S.C. §§ 3729-3733, if the United States does not initially intervene in the litigation?

PARTIES TO THE PROCEEDING

The parties in the United States Court of Appeals for the Fifth Circuit were *qui tam* plaintiff Chandra Mittal, Ph.D. and defendants Texas Southern University (a state entity), Barbara Hayes, Arun Jadhav, Doctor, Curtis W. McDonald and Joseph Jones. There are no parent or publicly held companies owning 10% or more of defendant entities.

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PETITION FOR A WRIT OF CERTIORARI

The United States *ex rel.* Chandra Mittal, Ph.D. respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (Appendix, *infra*, at App. 20a - App. 21a) is not reported. The opinion of the district court (App.1a - App. 17a) is; likewise, not reported.

JURISDICTION

The judgment of the court of appeals was entered on December 20, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Eleventh Amendment to the United States Constitution provides that:

> The Judicial power of the Untied States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

The False Claims Act ("FCA"), 31 U.S.C. §§ 3729-3733.

STATEMENT OF THE CASE

1. The False Claims Act, 31 U.S.C. §§ 3729-3733, is the federal Government's "primary litigative tool for combating fraud" committed by all "unscrupulous contractors and grantees." S. Rep. No. 345, 99th Cong., 2d Sess. 8 (1986), reprinted in, 1986 U.S.C.C.A.N. 5266, 5273. Under the Act, any person who, *inter alia*, knowingly presents or causes to be presented a false or fraudulent claim to the United States for payment or approval is liable to the Government for three times the amount of damages which the Government sustains because of that person's act plus penalties for each false claim submitted.

In 1986, Congress substantially amended the False Claims Act and, in particular, its *qui tam* provisions. Section 3730(b) allows any person to bring a False Claims Act suit in the name of the Government to recover damages suffered by the United States and to share in any recovery obtained as a result of the suit. The *qui tam* plaintiff, known as a relator, initiates a suit, by filing a complaint under seal in a United States District Court. Simultaneously, the relator must serve a copy of the complaint on the federal Government together with a written disclosure statement describing all of the information and evidence in the relator's possession relating to the case. 31 U.S.C. § 3730(b)(2).

The United States then has at least 60 days to investigate the relator's allegations and determine whether to intervene and proceed with the action. *Id.*, § 3730(b)(3). If

the United States intervenes, the action is conducted by the Government. *Id.*, § 3730(b)(4)(A). If the Government chooses not to intervene, the relator has the right to proceed with the action in the Government's name, albeit with significant Government oversight and without the United States ever truly relinquishing control of the litigation. See *Id.*, §§ 3730(c)(2) and (3).

2. Relator Chandra Mittal filed this *qui tam* action under seal on February 21, 1997 in the Southern District of Texas, Houston Division. Mittal alleged that defendants violated the FCA by submitting false claims to the United States with the Research Center in Minority Institutions ("RCMI") program, a division of the National Institutes of Health ("NIH"). Specifically, relator alleged that in violation of applicable laws and regulations, defendants submitted grant applications to the RCMI representing that the faculty hired under the RCMI program would become university employees after the funding ended. When the RCMI program grant expired, the university terminated Dr. Mittal's employment.

3. On June 17, 1997, the government filed its election to decline intervention. The District Court then ordered the complaint unsealed on June 18, 1997. After being served with the complaint, defendants moved to dismiss on August 20, 1997, contending, first, that the Eleventh Amendment precludes the suit, and second, that the state is not a "person" under the FCA.

4. The District Court then addressed defendants' motion to dismiss based on Eleventh Amendment immunity and their contention that states do not qualify as "persons" liable as defendants under the False Claims Act. In an order

dated January 20, 1999, the District Court denied defendants' motion on both grounds. (App. 1a - App. 17a). Defendants timely appealed, and the District Court stayed all proceedings pending the outcome of the appeal.

5. On December 20, 1999, the Fifth Circuit panel reversed the district court's decision with respect to the Eleventh Amendment, holding that the matter at bar was "...controlled by *United States, ex rel. Foulds v. Texas Tech Univ.*, 171 F.3d 279, 294 (5th Cir. 1999)(holding that "when the United States has not actively intervened in the action, the Eleventh Amendment bars qui tam plaintiffs from instituting suits against the sovereign states in federal court." (App. 20a - App. 21a).

REASONS FOR GRANTING THE PETITION

This case presents a question already at issue in *State of Vermont Agency of Natural Resources v. United States ex rel. Stevens*, No. 98-1828 (cert. granted June 24, 1999). Both this case and *Stevens* concern whether the Eleventh Amendment precludes a *qui tam* action if the United States initially does not intervene in the case. Accordingly, the Court's resolution of *Stevens* will govern the disposition of this case, and the petition in this case should be held pending the decision in *Stevens* and then disposed of in light of that decision. Moreover, *Stevens* presents an additional question that, depending on the Court's ruling, may well be dispositive here. The Fifth Circuit declined to decide whether a state is a "person" under the FCA, an issue raised squarely in *Stevens*. The Court's resolution of both the Constitutional and statutory questions presented in *Stevens* will affect the outcome of this case.

I. THE CIRCUITS ARE IN CONFLICT OVER THE ELEVENTH AMENDMENT QUESTION PRESENTED.

The decision of the Fifth Circuit conflicts directly with the opinions of the Second, Fourth and Eighth Circuit Courts of Appeals[1] and stands alone in its ruling that sovereign immunity bars suits by relators under the *qui tam* provisions of the FCA. See *United States ex rel. Stevens*, 162 F.3d 195, 202 (2d Cir. 1998), cert. granted, 191 S.Ct. 2391 (June 24, 1999); *United States ex rel. Rodgers v. Arkansas*, 154 F.3d 865 (8th Cir. 1998), cert. dismissed, 119 S.Ct. 2387 (June 21, 1999); *United States ex rel. Milam v. The University of Texas M.D. Anderson Cancer Center*, 961 F.2d 46, 48 (4th Cir. 1992). The analysis of, and conclusion reached by, the majority of the Circuits is unquestionably correct.

As the Second Circuit framed it: "[t]he question for the present case is whether a *qui tam* suit under the FCA should be viewed as a private action by an individual and hence barred by the Eleventh Amendment, or one brought by the United States, and hence not barred." *Stevens*, 162 F.3d at 202. See also *Milam*, 961 F.2d at 48 ("The issue then is simply stated: is this a suit by the United States?"); *Rodgers*, 154 F.3d at 868 ("We held that a *qui tam* action under this Act is a suit by the United States for Eleventh Amendment purposes"). In answering this question, the Eighth Circuit,

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[1] In an opinion later vacated on other grounds, the Ninth Circuit Court of Appeals also held that the Eleventh Amendment does not bar *qui tam* suits under the FCA. See *United States ex rel. Fine v. Chevron, U.S.A., Inc., et al.*, 39 F.3d 957 (9th Cir. 1994), vacated *en banc*, 72 F.3d 740 (9th Cir. 1995), cert. denied, 116 S.Ct. 1877 (1996).

like the Second and Fourth Circuits, looked pragmatically at the False Claims Act both in terms of its operation and its underlying purpose.

"The focus of the Act is on exposing fraud on the government and recovering resulting government losses. The *qui tam* provisions facilitate this process, but they do not alter the underlying character of the action as one for the aggrieved party as defined by the statute." *Rodgers*, 154 F.3d at 868. And the aggrieved party, as the Eighth Circuit and every other Circuit to have addressed the issue, including the Fifth, has concluded, is the United States. *Id*; *Stevens*, 162 F.3d at 202; *Searcy v. Philips Electronics North America Corp.*, 117 F.3d 154, 156 (5th Cir. 1997); *United States ex rel Hyatt v. Northrop Corp.*, 91 F.2d 1211, 1217 n.8 (9th Cir. 1996) (citing *Killingsworth v. Northrop Corp.*, 25 F.3d 715, 720 (9th Cir. 1994); *United States ex rel. Kreindler & Kreindler v. United Technologies Corp.*, 985 F.2d 1148, 1154 (2d Cir.), cert. denied, 508 U.S. 973 (1993); *United States ex rel. Hall Dev. Corp.*, 49 F.3d 208, 1213 (7th Cir. 1995); See also *Milam*, 961 F.2d at 49 ("the structure of the *qui tam* procedure, the extensive benefit flowing to the government from any recovery, and the extensive power the government has to control the litigation weigh heavily against the Center's position [that the Eleventh Amendment bars the action].").

In the *Foulds* case, the Fifth Circuit focused solely on the "commences or prosecutes" language of the Eleventh Amendment and then narrowly construed the government's role in *qui tam* cases, particularly in cases where the government has not intervened. For example, the Circuit stated that "the government retains *some* possessory rights to the proceeds of the suit," as if a seventy percent share of

the damages, to which the government is at a minimum entitled (31 U.S.C. § 3730(d)(2)), is an inconsequential amount. *Foulds*, 171 F.3d at 290 (emphasis added).

The Circuit contended further that the relator not the United States determines "how, when and in what matter to make demands on a state, . . . whether to settle with a state and on what terms, etc." *Id.*, 171 F.3d at 293. But, the United States, as the Fifth Circuit itself recently held, has an unequivocal statutory right to veto any settlement negotiated by a relator, even in cases where the government has not intervened. *Searcy*, 117 F.3d at 159.

Similarly, the Fifth Circuit asserted that "[t]he fact that the government has not a penny staked in this case plays an important role in determining which party has commenced and prosecuted the suit for Eleventh Amendment purposes." *Foulds*, 171 F.3d at 293. Yet, the record in this very case belies that assertion. First, the government expended resources investigating the allegations made by relator. Second, in this case, as it is entitled to under the statute,[2] the government requested that the parties serve the Department of Justice with all of the pleadings. Third, the government did take an active role litigating this motion below. The United States has committed resources to this litigation sufficient to give it more than a "chimerical presence" in the case. *Id.*

In fact, all *qui tam* cases, regardless of whether the government intervenes, are cases that so involve the government that, as a practical matter, they are brought and prosecuted by the United States. The False Claims Act

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[2] See 31 U.S.C. § 3730(c)(3).

specifically requires that *qui tam* actions be "brought in the name of the Government." 31 U.S.C. § 3730(b)(1). Moreover, *qui tam* actions under the False Claims Act are authorized only to recover funds wrongfully taken or withheld from the United States. The government, not the *qui tam* plaintiff, suffers the "injury in fact" necessary for Article III standing. *Kreindler & Kreindler*, 985 F.2d at 1154; *Milam*, 961 F.2d at 49. And, as noted, the vast majority of any money recovered by a *qui tam* plaintiff is returned to the United States Treasury. See 31 U.S.C. § 3730(d).

Even in cases where the government elects not to intervene in a *qui tam* action, numerous provisions of the False Claims Act make plain that the case is truly the United States'. First, even if the government declines to intervene initially, it may do so at any time during the course of litigation, upon a showing of good cause, and assert its primary authority over the prosecution of the action. See 31 U.S.C. § 3730(c)(3). Alternatively, the government may seek to dismiss the action "notwithstanding the objections of the person initiating the action." Id., at § 3730(c)(2)(a). If the government allows the relator to conduct the litigation on the United States' behalf, the government still retains the right to be kept informed of any or all aspects of the proceedings. Id., at § 3730(c)(3). Finally, as noted, the Attorney General of the United States always retains the right to object to a *qui tam* plaintiff's effort to dismiss a case in which the government has declined to intervene or to object to a settlement proposed on the government's behalf. Searcy, 117 F.3d at 159-160.

This degree of government involvement and control over a *qui tam* case, even when the government does not

intervene in the action, led the Second, Fourth and Eighth Circuits to conclude that "a *qui tam* action under this Act is a suit by the United States for Eleventh Amendment immunity purposes." *Rodgers*, 154 F.3d at 868. Thus, the Fifth Circuit's decision conflicts both in its reasoning and outcome with the other Circuits to have considered the issue. These conflicts can only be resolved through the Court's review of the question presented by this case.

II. THE FIFTH CIRCUIT RELIES ERRONEOUSLY ON THIS COURT'S OPINION IN *BLATCHFORD V. NATIVE VILLAGE OF NOATAK.*

The Fifth Circuit recognized that the Eleventh Amendment would not apply if the False Claims Act formally established Foulds as "the deputy of the United States." *Foulds*, 171 F.3d at 290, 291. The panel then concludes that the Supreme Court's opinion in *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 784 (1991) establishes that "Congress cannot delegate to private citizens the United States' sovereign exemption from Eleventh Amendment restrictions." *Id.*, at 291-292.

Blatchford did not so hold. To be sure, in *dicta*, the Court expressed doubt "that the sovereign exemption can be delegated," *Blatchford*, 501 U.S. at 785, but the application of that sentiment to *qui tam* actions is fundamentally erroneous. The question here is not one of delegation, but of representation. Under the False Claims Act, Congress has not delegated its authority to sue states to private persons for their personal benefit alone; Congress has invited whistleblowers to take action specifically in order to benefit the federal government.

The difference between delegation and representation distinguishes the circumstances in *qui tam* litigation from those addressed by the Supreme Court in *Blatchford*. There, the question raised was not whether the United States could empower private persons to act on the Government's behalf for purposes of pursuing the federal government's claims, but whether the Government could assign to an Indian tribe for the tribe's benefit alone the United States' power to sue states. 501 U.S. at 785-786. Because the Court concluded that Congress never intended to make such a delegation in the statute at issue, it did not decide whether Congress had the authority to do so. *Id.* The Court's comments in *dictum* about whether States have consented to suit by "anyone the United States might select," *id.*, take on a fundamentally different meaning in the context of litigation where wholly private interests — and not the interests of the United States itself — are at issue.

Thus, *Blatchford* does not stand for the proposition that the federal government cannot authorize private citizens to act on the government's behalf. Indeed, the use of *qui tam* provisions predates the founding of the Union, and during the early years of the Union, such provisions were routine in federal and state legislation. See *U.S. ex rel. Marcus v. Hess*, 317 U.S. 537, 541 (1943). See also E. Caminker, The Constitutionality of *Qui Tam* Actions, 99 *Yale L.J.* 341, 342 & nn.2&3 (1989). While it is unknown when the first *qui tam* suit against a State was filed, it is beyond dispute that the concept that private persons could be recruited legislatively to represent the government in litigation was well established at the time of the Constitutional Convention.

As the Second Circuit succinctly explained, in *Blatchford*:

> Native American tribes sued the State of Alaska, arguing that they should be allowed to bring such a suit because the United States is empowered to bring a suit for the benefit of the tribes. Plainly in those circumstances, however, the injury to be remedied was one to the tribes, not to the federal government, and the cause of action did not belong to the government. The Supreme Court's rejection of the contention that the tribes should be allowed to pursue their own rights in suits against the States does not persuade us that the United States may not authorize a person other than the Attorney General to bring suit against the States on behalf of the United States to assist the United States in recovering moneys of which it has been defrauded.

Stevens, 162 F.3d at 203.

CONCLUSION

The petition for writ of certiorari should be held pending the decision in *State of Vermont Agency of Natural Resources v. United States ex rel. Stevens*, No 98-1828 (cert. granted June 24, 1999) and then disposed of as appropriate in light of the decision in that case.

Respectively submitted,

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APPENDIX A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
ENTERED
Jan 22 1999
Michael N. Milby, Clerk of Court

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

UNITED STATES OF AMERICA ex rel. DR. CHANDRA MITTAL, Plaintiff,	§	
	§	**CIVIL ACTION**
v.	§	**NO. H-97-554**
TEXAS SOUTHERN UNIVERSITY, et al., Defendants.	§	

ORDER

Pending before the Court is Defendants' Motion to Dismiss Under Rules 12(b)(1) and 12(b)(6) (Dkt. #17). Having considered the motion, the response thereto, the entire record and the applicable legal authorities, the Court believes that the motion should be DENIED.

FACTUAL BACKGROUND

Dr. Mittal was hired by Texas Southern University ("TSU") in 1992 to work as a Senior Research Associate, a

non-faculty position which required him to teach in the "Hypertension Cluster" of a project called "Center for the Study of Ethnic Diseases." This project was funded by a grant from the Research Center in Minority Institutions (RCMI) which is a division of the National Institutes of Health ("NIH"), a federal agency. The funding of this project, pursuant to the grant applications submitted by TSU, is the subject of this qui tam action brought under the False Claims Act ("FCA"), 31 U.S.C. § 3730.

In the complaint, Plaintiff/Relator alleges that, in order to obtain RCMI funding from the NIH, "TSU committed to the NIH that the 'faculty hired under the RCMI program after this cycle of RCMI funding has ended' would become university employees' transfer[ed] to a state line.'" Plaintiff Relator's Original (complaint, ¶ 14 (quoting TSU's 1992 RCMI Application for Continuation Grant at 55). This was an important statement, Plaintiff alleges, because "(t)he RCMI program requires that beyond the period of RCMI support, recipient institutions will maintain on a long term basis the faculty recruited and physical infrastructure developed." *Id.* ¶ 13. Plaintiff alleges that TSU"s representation concerning its commitment to transfer Senior Research Associates hired under the RCMI program was false because Mittal was never given a faculty position and because "TSU" has no sincere intention of employing Mittal after the expiration of the RCMI grant." *Id.* ¶ 14.

Plaintiff also alleges that TSU made numerous subsequent false statements concerning (1) similar representations that Mittal would be retained' (2) the submission of a partially, plagiarized project for NIH funding; (3) a 1993 request for funding (pursuant to TSU's 1993 Minority Biomedical Research Support Program ("MBRS") Application) of Mittal's project for a four-year period (September 1994 through August 1998) even though TSU knew that Mittal's

salary was funded only by the RCMI grant and that TSU would not offer Mittal a permanent position at the University; (4) representations in applications and "continuation application" to MBRS that (a) Mittal's subproject was continuing and (b) Mittal would continue to do research and be employed by TSU for the period of the grant (September 1, 1995 to August 31, 1996) even though TSU had already informed Mittal that his position would be terminated effective August 31, 1995; and (5) representations by TSU in its Training Grant Application to the Center for Disease Control/ MHPF "CDC/MHPF") for a Ph.D program for the period September 1994-1999 that Mittal was a faculty mentor even though Mittal was not a faculty member and his name was deleted from the program after the CDC/MHPF had approved the funding. *See id.* ¶¶ 21-39.

Defendant has moved to dismiss the case on four grounds; (1) Plaintiff/Relator's alleged failure to adhere to the "jurisdictional prerequisites" provided by 32 U.S.C. § 3730(b)(2)-(4); (2) Plaintiff/Relator's failure to state a claim for relief under the statute, or in the alternative; Plaintiff/Relator's failure to plead with particularity as required by Federal Rule of Civil Procedure 9(b); (3) TSU's immunity from suit under the Eleventh Amendment, and (4) TSU's immunity from suit under the FCA because TSU and its officials, as "State Defendants," are not "persons" who may be held liable. The Court will consider these arguments in turn.

1. **Plaintiff's Compliance with Statutory Prerequisites**

The False Claims Act provides that

> Any person who:
>
> > 1) knowingly presents, or causes to be presented, to an officer or employee of the United States Government . . . A false or fraudulent claim for payment or approval; (or)

> (2) knowingly makes, uses, or causes to **be made** or **used**, a false record or statement to get a false or fraudulent claim paid or approved by the Government . . .
>
> Is liable to the United States Government for a civil penalty of not less than $5,000 and not more than $10,000, plus 3 times the amount of damages which the Government sustains because of the act of that person [unless the court finds that the person committing the violation furnished information to Government officials concerning the false claim within 30 days after obtaining the information (if, at the time the person furnishes the information, no criminal, civil or administrative action has begun) or the person otherwise fully cooperates with the Government investigation of such violation, in which case.]
>
> the court may assess not less than 2 times the amount of damages which the Government sustains because of the act of the person.

31 U.S.C.A. § 3729(a) (West Supp. 1998). The False Claims Act defines "knowingly" as (1) having "actual knowledge of the information," (2) "act[ing] in deliberate ignorance of the truth or falsity of the information," or (3) "act[ing] in reckless disregard of the truth or falsity of the information." *Id.* § 3729(b). The Act further provides that "no proof of specific intent to defraud is required. *Id.* A "claim" is "any request or demand, whether under a contract or otherwise, for money or property which is made to a contractor, grantee, or other recipient if the United States Government provides any portion of the money or property which is requested or demanded . . . ." *Id.* § 3729(c).

Section 3730 of the False Claims Act provides that "(a)

person may bring a civil action for a violation of section 3729 for the person and for the United States Government. The action shall be brought in the name of the Government." *Id.* § 3730(b). The person bringing such an action must comply with certain statutory requirements.

> A copy of the complaint and written disclosure of substantially all material evidence and information the person possesses shall be served on the Government pursuant to Rule 4(d)(4) [now Rule 4(i)] of the Federal Rules of Civil Procedure. The complaint shall be filed in camera, shall remain under seal for at least 60 days, and shall not be served on the defendant until the court so orders. The Government may elect to intervene and proceed with the action within 60 days after it receives both the complaint and the material evidence and information.

Id. § 3730(b)(2). If the Government declines to take over the action, "the person bringing the action shall have the right to conduct the action" and " shall receive an amount which the court decides is reasonable for collecting the civil penalty and damages. The amount shall be not less than 25 percent and not more than 30 percent of the proceeds of the action or settlement and shall be paid out of such proceeds" *Id.* § 3730(b)(4) & (d)(2). However, a court does not have jurisdiction over such actions by a private party unless the party is "an original source of the information." *Id.* 3730(e)(4)(A)-(B) (defining "original source" as "an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based on the information").

According to the affidavit testimony of Samuel Longoria, Assistant United States Attorney, Mittal served the complaint on the United States Government on or about March 11, 1997 in compliance with both 31 U.S.C. § 3730(b)(2) and the Federal Rules of Civil Procedure.[1] Additionally, he filed the complaint with the Court *in camera*. The case was kept under seal until the United States notified the Court on June 17, 1997 of its intention to decline intervention in the case. Accordingly, the Court ordered the case unsealed on June 18 , 1997. This course of events clearly meets the procedural requirements listed in § 3730(b)(2)-(4). The case cited by Defendants does not provide otherwise. *See Searcy v. Philips Electronics North America Corp.*, 117 F/3d 154 (5th Cir. 1997) (merely noting § 3730(b)'s prerequisites when finding (1) that the government could appeal despite its failure to intervene at the outset of litigation and (2) that voluntary dismissal could not be granted without consent of the Attorney General).

Defendants' assertion that the case should be dismissed because *the complaint failed to allege* the meeting of these procedural prerequisites is unfounded. There is no statutory requirement that the relator make such allegations in his complaint; such a requirement would not make sense given the simultaneous filing of the complaint under seal and the service of the sealed complaint upon the United States. Moreover, even is such a strange requirement existed, Plaintiff's failure to observe it would not be jurisdictional. Courts have consistently found the prerequisites listed in §3730(b)(2)-(4) to be procedural in nature, *not jurisdictional*. *See United States ex*

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[1]The affidavit states that the complaint was served in compliance with Federal Rule of Civil Procedure 4(d)(4), the predecessor to Federal Rule of Civil Procedure 4(i). The Court assumes that the reference was in error and that the service met the provisions of Federal Rule of Civil Procedure 4(i), the provision relevant to service upon the United States.

rel. Weinberger v. Equifax, 557 F.2d 456, 460 (5th Cir. 1977) (relator does not lack standing simply he fails to comply with procedural requirement of the Act), *cert. denied*. 434 U.S. 1035 (1978); *United States ex rel. Siller v. Becton Dickinson & Co.*, 21 F.3d 1339, 1344 (4th Cir.) (§ 3730(b)(4) is not a jurisdictional requirement, *cert. denied*, 513 I/S/ 928 (1994); *United States ex rel. Mikes v. Straus*, 931 F. Supp. 248, 259-60 (S.D.N.Y.,(1996) ("The notification provision [of § 3730 (b)(2) is a mere procedural requirement of the exercise of the right created by the statute, not a jurisdictional prerequisite [and] where the government has not been deprived of any rights, and has asserted no objection to plaintiff's failure to comply with § 3730(b)(2)'s procedural requirements, defendants should not stand to benefit.")

II The Sufficiency of the Complaint

Next, Defendant argues that the case should be dismissed for failure to state a claim upon which relief can be granted and/or for failure to plead with particularity as required by Federal Rule of Civil Procedure 9(b). It is true that "[c]laims brought under the FCA must comply with Rule 9(b) [and a]t a minimum. Rule 9(b) requires that a plaintiff set forth the `who, what, where, and how' of the alleged fraud." *United States ex rel. Thompson v. Columbia/HCA Healthcare Corp.*, 125 F.3d 899, 903 (5th Cir. 1997) ("the complaint must set forth a factual basis ").

Plaintiff's lengthy complaint details eight separate false claims allegedly made by Defendants to federal agencies in order to obtain federal funding. For each of these claims, Mittal sets forth the "who, what, where, and how" of the assertions and provides an adequate factual basis (for Rule 9(b) purposes) for each of the assertions. His complaint clearly states a claim upon which relief can be granted and is pled with sufficient particularity. Therefore, the Court will not dismiss on this

ground.

III The Liability of a State, Its Agencies and Its Officials for Violations of the False Claims Act

Defendants argue that they, as "State Defendants," cannot be liable for violations of the FCA both because such liability is prohibited by the Eleventh Amendment and because states should not be considered "persons" subject to liability under the FCA. The Court will address these arguments in turn.

A. These Defendants Are Not Immune From Suit Under the False Claims Act by Virtue of the Eleventh Amendment

Defendants argue that the Eleventh Amendment bars suits brought by **qui tam** plaintiffs under the FCA because such actions constitute federal law suits **brought by private parties without the consent of the state or the abrogation of the state's immunity by Congress. Essentially, they argue that because the suit is brought by a private party, albeit through a *qui tam* device**, the suit must meet the scrutiny of the Eleventh Amendment. As Texas has not waived its immunity in this case, Defendants argue that the Court must, therefore, apply the standards in *Seminole Tribe v. Florida* to determine whether Congress has abrogated the states' sovereign immunity. Application of *Seminole Tribe v. Florida* would require the Court to consider (1) **whether** in enacting the FCA, Congress "unequivocally expresse[d] its intent to abrogate the immunity." and (2) "whether Congress has acted 1pursuant to a valid exercise of power.'" 517 U. S. 44, 55 (1996). Defendants then argue that no such unequivocal expression is apparent in the statute and, even if it were, Congress did not act pursuant to a valid exercise of power in making the states subject to suit. Therefore, Defendants conclude that they may

not be held liable for violations of the FCA. The Court disagrees

It is undisputed that the state university Defendants in this case enjoy the state's Eleventh Amendment immunity, to the extent that it applies. *See Wallace v. Texas Tech Univ.*, 80 F.3d 1042, 1047 n.3 (5th Cir. 1996); *United States ex rel. Fine v. Chevron, U.S. A., Inc.*, 39 F.3d 957, 962 (9th Cir. 1994) (a university is a state entity for the purposes of the Eleventh Amendment). *vacated on other grounds*, 72 F.3d "40 (9th Cir. 1995) (en banc), *cert. denied*, 517 U. S. 1233 (1996). The Eleventh Amendment provides that "(t)he Judicial Power of the United States shall not be construed to extend to any unit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or Citizens of any Foreign State." U.S. Const. amend. XI. It is well-established that this Amendment also bars suits against a state by its own citizens. *See Monaco v. Mississippi*, 292 U.S. 313, 329 (1934). However, the states have no sovereign immunity against the United States. *See id.* (A permanent waiver of the states' immunity from suit by the United States is "inherent in the constitutional plan"); *United States v. Mississippi*, 380 U.S. 128, 140 (1965) ("nothing in[the Eleventh Amendment] or in any other provision of the Constitution prevents or has ever been seriously supposed to prevent a State's being sued by the United States"); *Seminole Tribe*, 517 U.S. at 71 n. 14 ("the Federal Government can bring suit in federal court against a State").

Therefore, the question in this case is whether a *qui tam* suit under the FCA should be viewed as a private action by an individual, and hence barred by the Eleventh Amendment, or one brought by the United States, and hence not barred. In ruling on this question, it is important to note **that** the circuit courts that have considered similar issues have **unanimously** agreed that the government is the real party in interest in *qui tam* actions brought under the FCA, even if the government

elects not to intervene in the case. *See United States ex rel. Milan v. University of Texas M.D. Anderson Cancer Center*, 961 F.2d 46, 48-50 (4th Cir. 1992) (finding that the United States is the real party in interest in any FCA suit, even where it permits a *qui tam* relator to pursue the action on its behalf, because (1) the suit is brought "in the name of the Government" by a relator who essentially a self-appointed private attorney general [and whose] recovery is analogous to a lawyer's contingent fee" (2) the injury is suffered by the government, not the individual, (3) the government may choose to intervene and pursue the suit itself, and (3) the government is entitled to the lion's share of any amount recovered since it gets at least 70% even if it does not intervene); *United States ex rel. Kreindler & Kreindler v. United Technologies Corp.*, 985 F/2d 1148. 1154 (2nd Cir.) ("In a *qui tam* action, the plaintiff sues on behalf of and in the name of the government and invokes the standing of the government resulting from the fraud injury.") *cert. denied*, 508 U.S. 973 (1993); *Minotti v. Lensink*, 895 F.2d 100, 104 (2nd Cir. 1990) ("although *qui tam* actions allow individual citizens to initiate enforcement against wrongdoers who cause injury to the public at large, the Government remains the real party in interest"); *United States ex rel. Zissler v. Regents of the University of Minnesota*, 154 F.3d 870, 872 (8th Cir. 1998) ("in an action under the False Claims Act, the United States is the real party in interest because of its significant control over the course of the litigation and its dominant share of the proceeds thereof"); *United States ex rel. Hall v. Tribal Development Corp.*. 49 F/3d 12011, 1212-13 (7th Cir. 1995) (finding that the Government, and not the relator, is the real party in interest and citing a long history of Supreme Court cases indicating that the Supreme Court would approve of this principle) (citing, for example, *Marvin v. Trout*, 199 U.S. 212, 225 (1995) which noted that *qui tam* actions "by a common informer, who himself had no interest whatever in the controversy other than that given by statute, have been in existence for hundreds of years in England, and in this country ever since the foundation of our

government"); *United States ex rel. Killingsworth v. Northrop Corp.*, 25 F.3d 715, 720 (9th Cir. 1994) (in a *qui tam* action, the Government is the real party in interest), *cert. denied*, 117 S. Ct. 296 (1996)[2]

The courts have also concluded that because of the government's status as the real party in interest, Eleventh Amendment immunity does not apply to *qui tam* actions brought against state entities. *See Milan*, 961 F.2d at 49-50 (because the United States is the real party in interest, the state university center's Eleventh Amendment immunity defense "evaporates");

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[2] The Fifth Circuit has not yet directly addressed the questions at issue in this case. However, in a case involving the government's right to appeal an order approving the settlement of a *qui tam* action under the FCA, the court noted that "the United States is a real party in interest even if it does not control the False Claims Act suit." *Searcy v. Philips Electronics North America Corp.*, 117 F.3d 154, 156 (5th Cir. 1997) (citing *United States ex rel. Milam v. University of Texas M.D. Anderson Cancer Center*, 961 F.2d 46, 48-49 (4th Cir. 1992)).

As the issue affects the *qui tam* plaintiff's standing and the defendant's potential immunity, the Fifty Circuit has not yet provided guidance. However, the matter is the subject of some dispute among the district courts within this circuit. In fact, at least two cases addressing the issues presented by this case are presently before the Fifty Circuit on appeal. In one, *United States ex rel. Foulds v. Texas Tech Univ.*, the court concluded that since the Government is the real party is interest in a *qui tam* action, it followed that sovereign immunity to the state defendant wqas unavailable and states could be liable under the FCA. 980 F. Supp. 864, 870-71 (N.D. Tex. 1997) (concluding (1) that a state university does not have Eleventh Amendment immunity from FCA suits and (2) that states are properly considered "persons" under the FCA). In another, *United States ex rel. Riley v. St. Luke's Episcopal Hosp.*, the court concluded that a *qui tam* plantiff, and not just the government, must suffer an injury-in-fact in order to bring suit under the FCA. 982 F. Supp. 1261, 1263-68 (S. D. Tex. 1997) (finding that the plantiff did not have standing to bring the suit).

United States ex rel. Berge v. Board of Trustees of the University of Alabama, 104 F.3d 1453, 1457-58 (4th Cir.) (Reaffirming the Fourth Circuit's holding that a state university does not have Eleventh Amendment immunity from suits under the FCA; holding that the Supreme Court's decision in *Seminole Tribe* (that Congress must use unequivocal statutory language if it intends to abrogate the sovereign immunity of states in actions brought by and for private parties) was "a non-issue in the False Claims Act context" because there is no question of abrogation of immunity where the Federal Government is the entity bringing suit against a state), *cert. denied*, 118 S. Ct. 301 (1997); *United States ex rel. Rodgers v. Arkansas*, 154 F.3d 865, 868 (8th Cir. 1998) ("a *qui tam* action under th[e FCA] is a suit by the United States for Eleventh Amendment immunity purposes"; therefore, "[t]he State and its agencies are not entitled to Eleventh Amendment immunity"); *United States ex rel. Regents of the Univ. of Minnesota*, 154 F.3d 870, 872-73 (8th Cir.1998) (reaffirming that state universities do not have immunity in FCA suits and finding that *Seminole Tribe* does not change the analysis since the Supreme Court decision did not place in question the power of the federal government to sue a state). *United States ex rel. Stevens v. Vermont Agency of Natural Resources*, No. 97-6141, 1998 WL 880610, at *7 (2d Cir. Dec. 7, 1998) ("In light of the fact that *qui tam* claims are designed to remedy only wrongs done to the United States, and in light of the substantial control that the government is entitled to exercise over such suits, we conclude that such a suit is in essence a suit by the United States and hence is not barred by the Eleventh Amendment."); *United States ex. Rel. Fine v. Chevron, U. S. A., Inc.*, 39 F.2d 957, 963 (9th Cir. 1994) (since the *qui tam* plaintiff's action against the University of California was really a suit by the United States, as the real party in interest, the suit was not barred by the Eleventh Amendment), *vacated on other grounds*, 72 F.3d 740 (9th Cir. 1995) (en banc), *cert. denied*, 517 U.S. 1233 (1996); *United States ex rel. Long v. SCS Business & Tech Inst.*, 999 F. Supp. 78, 83-84 (D.

D.C. 1998) (finding that the Eleventh Amendment is not a bar to an FCA action "because the United States is always the plaintiff in a *qui tam* action and the Eleventh Amendment does not prohibit suits by the United States against States in federal court"; listing numerous cases in which states, and state universities, have been defendants in *qui tam* suits under the FCA.

The Court agrees with the conclusions reached by these courts. Therefore, the Court finds that in this case (1) the United States is the real party in interest, (2) the suit is, therefore, for Eleventh Amendment purposes, a suit by the United States against which the State Defendants have no Eleventh Amendment immunity, and (3) the standards articulated by *Seminole Tribe* are, therefore, inapplicable as the *Seminole Tribe* test for o,,immunity abrogation does not apply to suits brought against states by the federal government. For these reasons, the Court rejects Defendants' motion to dismiss on the ground that they are entitled to Eleventh Amendment immunity.

B. State Entities Are "Persons" that May Be Liable for FCA Violations

Defendants' final argument is that *qui tam* suits against the states are not authorized by the FCA itself since states are not "persons" as that term is used in the FCA. Section 3792(a) imposes liability on "[a]ny person" who makes false statements or claims to the United States government, but it does not define the term "person." Nevertheless, by employing ordinary statutory construction principles and conducting an analysis of legislative history, the Second and Eighth Circuits have found that states should be viewed as "persons" within the liability

provisions of the FCA.[3]

1. The "Plain Statement" Rule Does Not Apply to the Construction of the FCA

Essentially, these courts have begun their analyses by rejecting the applicability of the "plain statement rule"; the rule that " unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance." *United States ex rel. Stevens v. Vermont Agency of Natural Resources*, No. 97-6141, 1998 WL 880610, at *7 (2d Cir. Dec. 7, 1998). They explained that "[t]he Supreme Court has never held that this principle is applicable in every instance n which it is argued that a statute imposes liability on the States. Rather, the . . . rule (applies) only when the effect of the statute would be to intrude on the States' traditional authority and upset the usual constitutional balance of federal and state powers.'" *Id.* (quoting *Gregory v. Ashcroft*. 501 U.S. 452, 460 (1991)); *see also Will v. Michigan Dept. of State Police*, 491 U.S. 58, 65 (1989) ("if Congress intends to alter the `usual constitutional balance between the States and the Federal Government, ' it must make its intentions to do so `unmistakably clear in the language of the statute").

With this standard in mind, the courts concluded that "a False Claims Act action against a State falls within 'the usual

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[3] The only authority to the contrary is found in district court opinions that have been either reversed or overruled by the Second or Eighth Circuits. *See United States ex rel. Zissler v. Regents of the Univ. of Minnesota*, 992 F. Supp. 1097 (D. Minn. 1998) (granted the university's motion to dismiss claims brought against it under the FCA since states are not persons under the FCA), *rev'd*, 154 F.3d 870 (8th Cir. 1998); *United States ex rel. Graber v. City of New York*, 8 F. Supp. 2d 343 (S. D. N. Y., 1998) (finding that staff, city and municipal agencies did not qualify as "persons" who could be sued under the FCA), *overruled by United States ex rel. Stevens v. Vermont Agency of Natural Resources*, No. 97-6141. 1998 WL 880610 (2nd Cir. 1998).

constitutional balance between the States and the Federal Government.' Therefore, Congress's intent to include States as liable parties need not be manifest in 'unmistakably clear' language." *United States ex rel. Zissler v. Regents of the University of Minnesota*, 154 F.3d 870, 874 (8th Cir. 1998); *see also Stevens*, 1998 WL 880610, at *8 ("In the FCA, we see no alteration of 'the usual constitutional balance of federal and state powers' such as to require application of the plain statement rule."). Accordingly, these courts rejected the application of the plain statement rule noting that since "the States have no Eleventh Amendment immunity against the United States *ab initio* [,] there is no reason Congress would have displaced it in the False Claims Act." *Zissier*, 154 F.3d at 873; *see also Stevens*, 1998 WL 880610 *8. The courts, therefore, proceeded to interpret the statute under the ordinary canons of statutory construction.

2. Construction of the Statute Leads to the Conclusion that States Are "Persons" under the FCA

In construing the statute, the courts made the following findings: (1) to the extent that a presumption against inclusior of a sovereign in the meaning of the term "person" is generally applicable to this case,[4] it does not prevail in this case because "[t]he purpose, the subject matter, the context, the legislative history, and the executive interpretation of the statute . . . indicate an intent, by the use of the term ("person") to bring [the state] within the scope of the law," *Zissler*, 154 F.3d at 874 (quoting *United States v. Cooper Corp.*, 312 U.S. 600, 605 (1941)); *see also Stevens* , 1993 WL 880610, at *8; (2)

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[4] The Eighth Circuit did not believe that this cannon of construction was applicable to states defending suits under the FCA because " the presumption of sovereign exclusion applies only to 'the enacting sovereign,' in this case the United States." 154 F.3d n 874

Congress's intent to include states within the term "person" is evident from its use of the same term in other provisions of the statute that have been widely recognized as encompassing states, *see Stevens*, 1998 WL 880610, at *8 (noting that "person" is used to define both who may be sued (in § 3729(a)) and who may bring a *qui tam* suit (in § 3730(b)(1)) and that states, Congress and courts have all indicated that they view states as "persons" able to bring *qui tam* action under § 3739(b)(1); citing numerous cases and the legislative history of *Wisconsin v. Dean*, 729 F.2d 1100 (7th Cir. 1984), a case which was cited in Congress with disapproval but which was not controversial for the proposition that suits could be brought by states; *Zissler*, 154 F.3d at 875 (noting the "normal rule of statutory construction" that "identical words used in different parts of the same act are intended to have the same meaning" and pointing out that states have acted as *qui tam* plaintiffs under § 3730 which allows civil actions by "private persons"); (3) since it is "plain" that states are "persons" within the meaning of § 3730(b)(1), there is an inference that Congress meant the word to have the same meaning in § 3729(a) absent some indication to the contrary, *see Stevens*, 1998 WL 880610, at *9; *see also Zissler*, 154 F.3d at 875 (since states act as plaintiffs, "[i]n the absence of language to the contrary, they should also be ` persons' when sued as defendants"); and (4) the legislative history of the 1986 amendments to the FCA indicate that Congress understood that the FCA had, at all times, applied to the states and would continue, after the 1986 amendments, to apply to the states, see *Stevens*, 1998 WL 880610, at *11 (citing a provision of the amendments authorizing certain investigations on "persons," specifically defined to include "any State or political subdivision of a State," and noting that [p]resumably, Congress would not have authorized such an investigation into whether States were engaged in violating the FCA unless States were among the `persons' who are suable under the Act").

Other courts have likewise held that states should be viewed as "persons" for purposes of the liability provision of the FCA. *See, for example, United States ex rel. Long v. SCS Business & Tech. Inst.*, 999 F. Supp. 78,84 (D. D. C. 1998) (in addition to making some of the same findings reached by the courts in *Zissler* and *Stevens*, the court observed that the Senate Report accompanying the 1986 amendments set out "the broad reach of the statute" when it stated that the FCA reaches all persons submitting false claims and that the "term 'person' is used in its broad sense to include partnerships, associations, and corporations . . . as well as States and political subdivisions thereof").

The Court agrees with the decisions of these courts. Accordingly, the Court finds that the State Defendants in this case are properly considered "persons" who may be liable for violations of the FCA. For all of the above reasons, Defendants' motion to dismiss is, in all things, DENIED.

So ORDERED.

The Clerk shall enter this order and provide a true copy to all parties.

SIGNED this 20th day of January, 1999.

/s/ John D. Rainey
JOHN D. RAINEY
UNITED STATES DISTRICT JUDGE

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
ENTERED
FEB 24 2000
Michael N. Milby, Clerk of Court

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

UNITED STATES OF AMERICA, ex rel. DR. CHANDRA MITTAL, Plaintiff,	§	**CIVIL ACTION**
v.	§	
TEXAS SOUTHERN UNIVERSITY, et al., Defendants.	§	

ORDER OF DISMISSAL

On January 22, 1999, this Court denied the defendants' motion to dismiss the instant case on Eleventh amendment grounds. The issue presented was whether a *qui tam* suit under the False Claims Act, 31 U.S.C., § 3730, should be viewed as a private action by an individual, and hence barred by the Eleventh Amendment, or one brought by the United States, and hence not barred. On March 29, 1999, the Fifth Circuit issued *United Stated ex rel. Foulds v. Texas Tech Univ.*, 171 F.3d 279 (1999) (holding that "when the United States has not actively intervened in the action, the Eleventh Amendment bars *qui tam*

plaintiffs from instituting suits against the sovereign states in federal court), *pet. for cert. filed*, 68 U.S.L.W. 3138 (August 23, 1999). On December 20, 1999, the Fifth Circuit found that the instant case is governed by *Foulds*, and therefore the case was remanded for entry of a judgment of dismissal. The mandate was issued on February 11, 2000. Accordingly, it is ordered that the plaintiff-relator's claims are DISMISSED.

SIGNED this 22nd day of February, 2000.

/s/ John D. Rainey
JOHN D. RAINEY
UNITED STATES DISTRICT JUDGE

APPENDIX C

U.S. COURT OF APPEALS
FILED
DEC 20 1999
CHARLES R. FULBRUGE III
CLERK

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 99-20099
Summary Calendar

UNITED STATES OF AMERICA, ex rel.
CHANDRA MITTAL, Ph. D.,
Plaintiff-Appellee,

versus

TEXAS SOUTHERN UNIVERSITY, et al.,
Defendants,

TEXAS SOUTHERN UNIVERSITY;
BARBARA HAYES; ARUN JADHAV, Doctor;
CURTIS W. MCDONALD; JOSEPH JONES,
Defendants-Appellants.

* Pursuant to 5th CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th CIR. R. 47.5.4.

((Initialed by) JS - RB - RWP)

Appeal from the United States District Court
for the Southern District of Texas
USDC No. H-97-CV-554

Before SMITH, BARKSDALE, and PARKER, Circuit Judges.

PER CURIAM:

This interlocutory appeal involves a *qui tam* action brought under the False Claims Act ("FCA") against Texas Southern University and some of its employees and former employees. Appellants appeal the denial of their motion to dismiss, which averred that plaintiff/relator's action is barred by the Eleventh Amendment and that defendants are not "persons" within the meaning of the FCA. This appeal is controlled by *United States, ex rel. Foulds v. Texas Tech. Univ.*, 171 F.3d 279, 294 (5th Cir. 1999) (holding that "when the United States has not actively intervened in the action, the Eleventh Amendment bars *qui tam* plaintiffs from instituting suits against the sovereign states in federal court"), **petition for *cert.* filed**, 68 U.S.L.W. 3138 (U. S. Aug. 23, 1999) (No. 99-321), **petition for *cert.* filed**, 68 U. S. L. W. 315; (U. S. Aug. 27, 1999) (No. 99-365), **petition for *cert.* filed** (Aug. 27, 1999) (No. 99-513). ***See also United States ex rel. Stevens v. Vermont Agency of Natural Resources***, 162 F.3d 195)2d Cir. 1998), ***cert.* granted**, 119 S. Ct. 2391 (1999).

Accordingly, the order denying the motion to dismiss is REVERSED, and the case is REMANDED for entry of a judgment dismissing the complaint.

Supreme Court, U.S.
FILED
APR 19 2000
CLERK

(2)

NO. 99-1566

In the Supreme Court of the United States

UNITED STATES OF AMERICA *EX REL.*
CHANDRA MITTAL, Ph.D.,
Petitioner,

v.

TEXAS SOUTHERN UNIVERSITY, BARBARA HAYES,
ARUN JADHAV, CURTIS W. McDONALD, JOSEPH JONES,
Respondents.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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NO. 99-1566

In the Supreme Court of the United States

UNITED STATES OF AMERICA *EX REL.*
CHANDRA MITTAL, Ph.D.,
Petitioner,

v.

TEXAS SOUTHERN UNIVERSITY, BARBARA HAYES,
ARUN JADHAV, CURTIS W. McDONALD, JOSEPH JONES,
Respondents.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

At issue in this case is whether the Eleventh Amendment's general prohibition against actions "commenced or prosecuted" by citizens against an unconsenting state bars an action brought by a private *qui tam* plaintiff against a state under the federal False Claims Act. U.S. CONST. amend. XI; 31 U.S.C. §§ 3729–3732.

The False Claims Act permits private citizens who believe a "person" has submitted a false claim for payment to the United States to sue the perpetrator to impose a penalty for the false claim, including treble damages. §§ 3729–3730. As an incentive, the private plaintiff receives a portion of the award. § 3730(d). While the statute deters fraud by private contractors, the Eleventh

Amendment prohibits applying the False Claims Act to unconsenting states. The False Claims Act contains no language waiving the Eleventh Amendment immunity of states and, in any event, Congress has no power to abrogate the states' Eleventh Amendment immunity under its Article I constitutional powers. *Seminole Tribe v. Florida*, 517 U.S. 44, 72-73 (1996).

SUMMARY OF THE ARGUMENT

The Eleventh Amendment prohibits suits "commenced or prosecuted" against the states by private citizens. U.S. CONST. amend XI. Suits against states brought by private relators under the *qui tam* provisions of the False Claims Act violate the states' immunity as sovereigns and offend their dignitary interest in avoiding the coercive process of federal judicial tribunals in suits brought by private citizens. Congress cannot circumvent the Eleventh Amendment's proscriptions by allowing private plaintiffs to "stand in the shoes" of the federal government. *Qui tam* suits are "commenced" and "prosecuted" by private citizens, and the potential intervention of the United States cannot change that fact.

Because the Court has already heard the petition for writ of certiorari in *United States ex rel. Stevens v. State of Vermont Agency of Natural Resources*, 162 F.3d 195 (2nd Cir. 1998), *petition for cert. granted*, 119 S.Ct. 2391 (June 24, 1999) (No. 98-1828), *argued Nov. 29, 1999*, to resolve the issue presented by petitioner, the Court should hold this petition pending resolution of *Stevens* and then dispose of the petition as appropriate.[1]

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[1] Respondents have also filed a conditional cross-petition that raises the "persons" issue also presented in the *Stevens* case.

ARGUMENT

I. ALLOWING PRIVATE CITIZENS TO BRING *QUI TAM* SUITS AGAINST THE STATES VIOLATES THE ELEVENTH AMENDMENT.

Subjecting the states to suits for money damages brought by private citizens under the *qui tam* provisions of the False Claims Act violates the Eleventh Amendment and the principles that motivated its passage. *See* 31 U.S.C. §§ 3729–3732; U.S. CONST. amend. XI. The Eleventh Amendment was enacted in a firestorm of protest shortly after the Supreme Court's decision in *Chisolm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793), which held that Article III authorized a South Carolina citizen to bring a private suit for damages against the State of Georgia. One of the Amendment's primary aims was to address the states' concern that "federal courts would force them to pay their revolutionary war debts, leading to their financial ruin." *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 39 (1994); *see also Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 406 (1821).

In addition to the concern with protecting the states' fisc, Eleventh Amendment jurisprudence also emphasizes the need to protect the integrity of the states as sovereign entities. *Hess*, 513 U.S. at 39. "The Amendment is rooted in a recognition that the States, although a union, maintain certain attributes of sovereignty, including sovereign immunity." *Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 146 (1993) (citing *Hans v. Louisiana*, 134 U.S. 1, 13 (1890)). The purpose of the Eleventh Amendment was to prevent the indignity of subjecting states to suits by private parties in federal court. *Id.* (citing *In re Ayers*, 123 U.S. 443, 505 (1887)).

By seeking money damages from the states at the urging of private plaintiffs, *qui tam* suits accomplish exactly what the

Eleventh Amendment forbids. The Court has recognized "that a suit by private parties seeking to impose a liability which must be paid from public funds in the state treasury is barred by the Eleventh Amendment." *Edelman v. Jordan*, 415 U.S. 651, 663 (1974). *Qui tam* suits brought by private citizens against the states are indistinguishable from other suits that impermissibly seek the payment of damages from a state's treasury. That the relator brings suit "on behalf of" the United States is irrelevant for Eleventh Amendment purposes. *See United States ex rel. Long v. SCS Bus. & Tech. Inst., Inc.*, 173 F.3d 870, 883-84 (CADC 1999), *petition for cert. filed*, 68 U.S.L.W. 3116 (U.S. Aug. 2, 1999) (No. 99-213). The *qui tam* relator's supposed representation of the United States' interests is a legal fiction that cannot justify granting a private plaintiff the United States' exemption from the Eleventh Amendment's protections. *See In re Fernandez*, 130 F.3d 1138, 1138 (CA5 1997) (holding that private successors to the FDIC may not "avoid the Eleventh Amendment by slipping into the shoes of the United States"); *see also West Virginia v. United States*, 479 U.S. 305, 311 (1987) (sovereign immunity is not at issue in suit by federal government against state); *United States v. Texas*, 143 U.S. 621, 646 (1892) (same). It is "as plain as the sun" that Petitioner was "commenc[ing] or prosecut[ing]" *qui tam* suits "against one of the United States" in violation of the clear dictates of the Eleventh Amendment. *United States ex rel. Foulds v. Texas Tech Univ.*, 171 F.3d 279, 289 (CA5 1999); *see also* U.S. CONST. amend. XI. The Eleventh Amendment's protections of state sovereignty cannot be circumvented so easily. *See Seminole Tribe v. Florida*, 517 U.S. 44, 72-73 (1996).

When an action "is in essence one for the recovery of money from the state, the state is the real, substantial party in interest and is entitled to invoke its sovereign immunity from suit." *Ford Motor Co. v. Department of Treasury of Ind.*, 323 U.S. 459, 464 (1945); *see also Regents of the Univ. of Cal. v. Doe*, 519 U.S. 425, 429 (1997). Even if the United States ultimately intervenes in the

suit, that does not change the Eleventh Amendment analysis.[2] A private citizen is still commencing suit against the state for money damages. The Eleventh Amendment cannot countenance an Act passed by Congress which gives a private citizen the right to commence suit against a sovereign state and make a claim on state funds, regardless of whether the United States has joined the suit as a party.

II. CONGRESS HAS NOT CLEARLY ABROGATED STATE SOVEREIGN IMMUNITY IN THE FALSE CLAIMS ACT.

Congress did not attempt in the False Claims Act to clearly abrogate state sovereign immunity. *See Seminole*, 517 U.S. at 55-56; *Foulds*, 171 F.3d at 294. But even if Congress had clearly attempted to abrogate state sovereign immunity in the False Claims Act, it could not have validly done so. The Court has only allowed abrogation of state sovereign immunity under the Fourteenth Amendment. *Seminole*, 517 U.S. at 59, 63 (overruling the Court's short-lived holding to the contrary in *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989) (plurality)). Congress enacted the False Claims Act under Article I of the Constitution, which the Court in *Seminole* and in several subsequent cases has held cannot be used to circumvent the Eleventh Amendment's limits on federal jurisdiction. *Id.* at 72-73; *see also United States ex rel. Stevens v. Vermont Agency of Nat. Resources*, 162 F.3d 195, 224 (CA2 1998) (Weinstein, J., dissenting), *petition granted*, (U.S. June 24, 1999) (No. 98-1828), *argued Nov. 29, 1999*.

The pertinent analysis when state sovereignty is involved does not end with determining whether Congress has attempted to find a way to bypass the Eleventh Amendment, *i.e.*, by allowing a private party to vindicate "real party" rights of the federal

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[2] Contrary to petitioner's assertion, *see* Pet. at 7-8, the United States has intervened in this suit only pursuant to 28 U.S.C. § 2403(a) to defend the constitutionality of the False Claims Act as applied to the states.

government. Rather, the real question, as explained by the Court in *Seminole*, is whether Congress has the constitutional authority to do what it has done. *See Seminole*, 517 U.S. at 59; *see also City of Boerne v. Flores*, 117 S.Ct. 2157, 2159 (1997) (holding that the Religious Freedom Restoration Act was not a proper exercise of Congress's Fourteenth Amendment enforcement powers). As the Fifth Circuit held and as the D.C. Circuit in *Long* observed, "[*q*]*ui tam* plaintiffs cannot qualify as surrogates of 'responsible federal officers' who have the right to represent the sovereign to sue the respective states." *Foulds*, 171 F.3d at 293; *see Long*, 173 F.3d at 883.

Just as Article I provided no basis for the expansion of Article III in *Seminole*, the federal government's right to sue states cannot be expanded in opposition to the Eleventh Amendment by the device of *qui tam* suits. It is offensive to the Eleventh Amendment to use the states' surrender of sovereignty to the federal government to allow private parties to bring states into court and prosecute actions against them.[3]

Nor can the *qui tam* relator hide behind the jurisdictional skirts of the federal government. Private citizens cannot assume the federal government's right to sue states, which "is a narrow and nontransferable exception to the broad and fundamental constitutional principle of state sovereign immunity embodied in the Eleventh Amendment." *Stevens*, 162 F.3d at 214 (Weinstein, J., dissenting) (citing *Blatchford v. Native Village of Noatak*, 501 U.S. 775 (1991)); *see also United States v. Texas*, 143 U.S. 621, 646 (1892) (recognizing the federal government's right to sue because states gave their consent in joining the union). This Court

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[3] One commentator has suggested that *qui tam* actions are the hidden source of power to allow Congress to render the Supreme Court law on abrogation meaningless and should be used routinely to vindicate federal rights. *See* Jonathan R. Siegel, *The Hidden Source of Congress' Power to Abrogate State Sovereign Immunity*, 73 TEX. L. REV. 539 (1995).

should require the United States to sue the states itself if, in the exercise of its supremacy, it determines that such a suit is required to preserve the "permanence of the Union." *Texas*, 143 U.S. at 644-45. The nature of dual sovereignty requires as much. "The preservation of the States, and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National government." *Texas v. White*, 74 U.S. (7 Wall.) 700, 725 (1868).

If the *qui tam* device in the False Claims Act poses no constitutional problem, then Congress could set up any number of statutory devices to circumvent state sovereignty as long as there is a federal interest. Without Congress so stating, every Title IX, Title VI, and Section 504 case against a state would become a potential *qui tam* case, in which the plaintiff will demand, not actual damages, but a share of three times the federal funds received by the state for the past six years. Every public benefits class action involving federal funds could be a potential *qui tam* case.

The False Claims Act is unconstitutional—if applied to the states—because, through the *qui tam* device, it attempts to accomplish precisely what is forbidden by the Eleventh Amendment.

CONCLUSION

For these reasons, the Court should hold the petition for writ of certiorari pending resolution of the *Stevens* matter.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 2000

TEXAS SOUTHERN UNIVERSITY;
BARBARA HAYES; ARUN JADHAV, Doctor,
CURTIS W. MCDONALD; JOSEPH JONES,
Cross-Petitioners,

v.

UNITED STATES OF AMERICA *EX REL.*
CHANDRA MITTAL, Ph.D.,
Cross-Respondent,

v.

UNITED STATES OF AMERICA,
Cross-Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

MITTAL'S BRIEF IN OPPOSITION TO THE CONDITIONAL CROSS-PETITION

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Cross-Respondent Mittal submits this Response to Texas Southern University, Barbara Hayes, Arun Jadhav, Curtis W. McDonald and Joseph Jones (hereafter collectively "TSU") Cross-Petition For a Writ of Certiorari (S.Ct. No. 99-1705). The issue in the cross-petition is whether State-funded institutions that engage in precisely the same kinds of fraudulent conduct affecting the federal treasury as do privately owned entities should be deemed exempt from the definition of "persons" that can be held liable under the 1986 amendments to the Federal False Claims Act. Cross-petitioners ask this Court to grant them such an exemption. They do so notwithstanding Congress's understanding at the time the 1986 amendments were introduced that States already could be held liable under the previous terms of the False Claims Act. And they do so despite Congress's clear intent to continue to hold States liable for fraudulent conduct at the time that it introduced major amendments to the Act in order to significantly strengthen and expand its usefulness as a weapon for fighting fraud against the United States.

CROSS-RESPONDENT'S STATEMENT OF THE CASE

1. The False Claims Act (hereafter "FCA"), 31 U.S.C. §§ 3729-3733, is the federal Government's "primary litigative tool for combating fraud" committed by all "unscrupulous contractors and grantees." S. Rep. No. 345 (1986), *reprinted in*, 1986 U.S.C.C.A.N. 5266, 5273. Under the Act, any "person" who, *inter alia*, knowingly presents or causes to be presented a false or fraudulent claim to the United States for payment or approval is liable to the Government for three times the amount of damages which the Government sustains because of that person's act plus penalties for each false claim submitted.

In 1986, Congress substantially amended the False Claims Act and, in particular, its *qui tam* provisions. Section 3730(b) allows any person to bring a False Claims Act suit in the name of the Government to recover damages suffered by the United States and to share in any recovery obtained as a result of the suit. The *qui tam* plaintiff, known as a relator, initiates a suit, by filing a complaint under seal in a United States District Court. Simultaneously, the relator must serve a copy of the complaint on the federal Government together with a written disclosure statement describing all of the information and evidence in the relator's possession relating to the case. 31 U.S.C. § 3730(b)(2).

The United States then has at least 60 days to investigate the relator's allegations and determine whether to intervene and proceed with the action. *Id.*, § 3730(b)(3). If the United States intervenes, the action is conducted by the Government. *Id.*, § 3730(b)(4)(A). If the Government does not intervene, the relator has the right to proceed with the action in the Government's name, albeit with significant Government oversight and without the United States ever truly relinquishing control of the litigation. *See Id.*, §§ 3730(c)(2) and (3).

2. Relator Chandra Mittal filed this *qui tam* action under seal on February 21, 1997, in the Southern District of Texas, Houston Division. Mittal alleged that defendants violated the FCA by submitting false claims to the United States through the Research Center in Minority Institutions ("RCMI") program, a division of the National Institutes of Health. Specifically, relator alleged that in violation of applicable laws and regulations, defendants submitted grant applications to the RCMI representing that the faculty hired under the program would become university employees after the funding ended. TSU obtained at least fourteen million dollars of funding under the

RCMI program. TSU then failed to retain the faculty hired, the essential precondition to obtaining the RCMI funds.

3. On June 17, 1997, the United States filed its election to decline active intervention at that time. The District Court unsealed the complaint on June 18, 1997.

After being served with the complaint, defendants moved to dismiss. They contended, first, that the Eleventh Amendment precludes the suit, and, second, that the state is not a "person" under the FCA. The District Court denied defendants' motion on both grounds.

4. Defendants appealed the District Court's order to the Fifth Circuit. The United States intervened in the appeal to defend the constitutionality of the FCA provisions allowing *qui tam* suits as they apply to state defendants.

5. On December 20, 1999, the Fifth Circuit dismissed the appeal, holding that it was controlled by *Foulds. U.S. ex rel. Foulds v. Texas Tech Univ.*, 171 F.3d 279, 294 (5th Cir. 1999) ("when the United States has not actively intervened in the action, the Eleventh Amendment bars qui tam plaintiffs from instituting suits against the sovereign states in federal court."), *petition for cert. filed*, 68 U.S.L.W. 3138 (Aug. 23, 1999) (S.Ct. No. 99-321), *petition for cert. filed*, 68 U.S.L.W. 315 (Aug. 27, 1999) (S.Ct. No. 99-365), *cross-petition for cert. filed*, (Aug. 27, 1999) (S.Ct. No. 99-513); see also *U.S. ex rel. Stevens v. State of Vermont Agency of Natural Resources*, 162 F.3d 195 (2nd Cir. 1998), *petition for cert. granted*, 119 S.Ct. 2391 (June 24, 1999) (S.Ct. No. 98-1828), *argued Nov. 29, 1999.*

REASONS FOR DENYING THE CROSS-PETITION

I. TSU'S STATUTORY ARGUMENTS ARE NOT RIPE FOR REVIEW.

Because it relates to a claimed right of immunity from suit, TSU's Eleventh Amendment challenge to the jurisdiction of federal courts to hear claims brought against state entities by *qui tam* plaintiffs under the False Claims Act was properly subject to interlocutory review pursuant to this Court's rulings in *Puerto Rico Aqueduct and Sewer Authority v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 147 (1993), and *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546 (1949). The trial court's determination that States are "persons" subject to potential liability under the Act, however, does not raise an issue that normally would give rise to the right to an immediate appeal.[1] In *Swint v. Chambers County Comm'n*, 514 U.S. 35, 49-50 (1995), this Court held that appellate courts lack discretion "to append to an ... appeal from a collateral order further rulings of a kind neither independently appealable nor certified by the district court." 514 U.S. at 47.[2] While *Swint*

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[1] States immediately may appeal orders denying claims of Eleventh Amendment immunity because the right to immunity from suit "is effectively lost if a case is erroneously permitted to go to trial." *Metcalf & Eddy, Inc.*, 506 U.S. at 144. TSU's statutory claim, however, is a defense to *liability*, not an immunity from suit. It thus may be asserted on appeal from a final judgment without loss of any essential benefit of the defense.

[2] The *Swint* Court reasoned that the statutory scheme of 28 U.S.C. §§ 1292(a)-(b) contemplates that *district courts* have "first line discretion" to determine which orders not enumerated in 28 U.S.C. § 1291 or otherwise appealable under *Cohen* are appropriate for interlocutory review; that the Rules Enabling Act empowers the Court to expand the list of orders appealable on an interlocutory basis only through the rule-making process of 28 U.S.C. § 2072 and not through judicial decision; and that "loosely

leaves room to invoke "pendent appellate jurisdiction" to permit appellate review of an otherwise non-appealable ruling that is "inextricably intertwined" with a properly appealable interlocutory order, or that must be decided to ensure "meaningful review" of the issue properly before the court, those circumstances do not exist in this case.

The Eleventh Amendment issue raised in this case is not "inextricably intertwined" with the statutory question decided by the court of appeals. Courts could — and, as the Fifth Circuit properly recognized in *Foulds*, properly *should* — determine the constitutional issue regarding jurisdiction before considering whether States are "persons" under the False Claims Act. If there is no jurisdiction over the claim, there is no proper case before the courts in which to reach non-jurisdictional issues. Similarly, if no Eleventh Amendment impediment to jurisdiction exists in *qui tam* cases against States, there is no compelling need for appellate courts to expand their jurisdiction to include questions of statutory interpretation before final judgment has been entered below. Indeed, this Court has followed precisely such a course of separating Eleventh Amendment jurisdictional questions from statutory interpretation questions in the past. In *Edelman v. Jordan*, 415 U.S. 651 (1974), for example, the Court adjudicated the scope of a State's Eleventh Amendment immunity without addressing whether States are "persons" under 42 U.S.C. § 1983, an issue that the Court only decided fifteen years later. *See Will v. Michigan Dept. of State Police*, 491 U.S. 58, 63 n.4 (1989). Moreover, the Eleventh Amendment question is not coterminous with the statutory question, nor does it subsume it. The statutory question is substantially

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allowing pendent appellate jurisdiction would encourage parties to parlay *Cohen*-type collateral orders into multi-issue interlocutory appeal tickets." 514 U.S. at 47, 49-50.

broader: TSU's arguments on that question, if accepted, would preclude all False Claims Act suits against state-run entities, including those brought directly by the Attorney General, who clearly is not subject to Eleventh Amendment immunities that justified an interlocutory appeal in this case.

While this Court has adhered in the past to a "*policy* of avoiding the *unnecessary* adjudication of federal constitutional questions," *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 294 (1981) (emphasis added); *see also United States v. National Treasury Emp. Union*, 513 U.S. 454, 477 (1995), that prudential doctrine presupposes that the Court *has* jurisdiction to review both grounds of decision. Because answering the question whether courts have jurisdiction over a claim is a *necessary* first step in determining whether *any* further issues may be addressed, any policy of addressing statutory questions before non-jurisdictional constitutional matters is irrelevant here.

II. STATES ARE "PERSONS" SUBJECT TO FALSE CLAIMS ACT LIABILITY.

TSU asserts that States are not among the "person[s]" that can be held liable under the False Claims Act for defrauding the United States. Specifically, TSU contends that because "person" is not defined in § 3729(a), and — according to TSU — Congress never intended States to be included among those that could be held liable under the Act, neither *qui tam* plaintiffs nor the United States itself can sue States for False Claims Act violations. TSU is wrong.

"[T]here is no hard and fast rule" that the term "person" should be construed to exclude States when it is used in federal statutes. *See United States v. Cooper Corporation*, 312 U.S. 600, 604-05 (1941). Indeed, the term "person" has frequently been held to include States and their political subdivisions even

where Congress did not define the term in a statute. *See, e.g., Helvering v. Stockholms Enskilda Bank*, 293 U.S. 84, 91-92 (1934)("It has been held many times that the United States or a state is a 'person' within the meaning of statutory provisions applying only to persons."); *Ohio v. Helvering*, 292 U.S. 360, 371 (1934)("The state itself, when it becomes a dealer in intoxicating liquors, falls within the reach of a tax either as a 'person' under the statutory extension of that word to include a corporation, or as a 'person' without regard to such extension."); *California v. United States*, 320 U.S. 577, 585 (1944)(Oakland and California each held to be among "entities other than technical corporation, partnership and associations [that] are included among 'persons'" subject to Shipping Act); *Plumbers' Union v. Door County*, 359 U.S. 354, 359 (1959)("This Court has many times held that government bodies not expressly included in a federal statute may, nevertheless, be subject to the law.").

"[W]hether the word 'person' when used in a federal statute includes a State cannot be abstractly declared, but depends upon its legislative environment." *Sims v. United States*, 359 U.S. 108, 112 (1959). If the purpose, subject matter, context, legislative history, or executive interpretation of the statute reveal such an intent, States and other sovereigns should be construed to fall within the meaning of the term. *International Primate Protection League v. Administrators of Tulane Educational Fund*, 500 U.S. 72, 83 (1991); *Cooper Corporation*, 312 U.S. at 605.

The "legislative environment" of the False Claims Act leaves no doubt that States are intended to be among the "persons" who can be held liable for defrauding the Federal Government. Every relevant factor leads to that conclusion.

A. The Purpose, Subject Matter and Legislative History of the False Claims Act Demonstrate that Congress Intended the Act to Reach States that Submit False Claims.

The Supreme Court "has repeatedly recognized that the authoritative source of legislative intent lies in the Committee Reports on the bill." *Thornburg v. Gingles*, 478 U.S. 30, 44 n.7 (1986). When the False Claims Act was substantially amended in 1986, Congress unequivocally expressed its understanding and intention that the liability provisions of the Act apply to States as well as to any other recipient of federal funds. The Senate Report that accompanied those amendments specifically noted:

> "The False Claims Act reaches *all* parties who may submit false claims. The term 'person' is used in its broad sense to include partnerships, associations, and corporations ... *as well as States and political subdivisions thereof.*"

S. Rep. No. 99-345, at 8 (emphasis added, internal citations omitted). This statement of the reach of the statute is entirely consistent with the broad remedial purpose of the Act. In addition, the Senate Report "strongly endorse[d]" the opinion offered by the Supreme Court in *United States v. Neifert-White Co.*, 390 U.S. 228, 232 (1968), that, since its inception, the False Claims Act "was intended to reach all types of fraud, without qualification, that might result in financial loss to the Government." S. Rep. No. 99-345, at 19. Indeed, Congress's primary purpose for overhauling the statute in 1986 was to make it more effective in redressing and deterring fraudulent claims that permeate "all Government programs" ranging from welfare and food stamp benefits, to multibillion dollar defense procurements, to crop subsidies and disaster relief programs, to Medicare and Medicaid programs. *Id.*, at 2-3, 21.

TSU contends that this Court's ruling in *Will v. Michigan Dept. of State Police*, 491 U.S. 58 (1989), requires that Congress make its intent "'unmistakably clear in the language of the statute' if it intends to subject a state to liability." TSU Pet. at 13, *quoting Will*, 491 U.S. at 65. In fact, no such broad-based restriction has ever been imposed on Congress. TSU conveniently omits key language from its quotation which demonstrates that *Will*'s discussion of the "clear statement" rule is a mere reference to the uniquely high standard for abrogating the Eleventh Amendment that was established in *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 242 (1985).[3] Read in their entirety, the relevant passages of *Atascadero* and *Will* plainly limit the requirement that congressional intent be unmistakably clear "in the language of the statute" to circumstances in which Congress intends *"to alter the 'usual constitutional balance* between States and the Federal Government.'" *Will*, 491 U.S. at 65, *quoting Atascadero*, 473 U.S. at 242 (emphasis added). Indeed, this Court has expressly disavowed the notion that *Will* extended the requirement set forth in *Atascadero* to apply where the issue to be determined is one of statutory construction and not one of altering the constitutional balance between States and the Federal Government. *See Hilton v. South Carolina Public Railways Com'n*, 502 U.S. 197, 205-206 (1991).

The *qui tam* provisions of the False Claims Act do not "alter the usual constitutional balance between States and the Federal Government." Whether it initiates a suit itself or permits a *qui tam* plaintiff to proceed on its behalf, the United States is *always* the real party in interest in False Claims Act

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[3] See also *Atascadero*, 473 U.S. at 253-54 (Brennan, J., dissenting)(majority in *Atascadero* creates, solely with respect to abrogating the Eleventh Amendment, a uniquely high hurdle for Congress to overcome in making its legislative intent manifest).

action and, since the inception of the Union, has had the inherent right to sue States for violating federal law. There is thus no basis to limit the means of ascertaining Congress's intent with respect to potential State liability under the Act to "unmistakably clear" language in the text of the Act itself.

TSU also errs in suggesting that Congress was mistaken in its understanding of the reach of the False Claims Act prior to its 1986 amendments. This argument ignores the three Supreme Court cases cited in Senate Report No. 99-345 in support of the conclusion that the False Claims Act applies to States. While the cited cases were not False Claims Act decisions, each holds that, where appropriate to fully implement the remedial purposes of an act, the term "person" is properly construed to include States and their political subdivisions. *Ohio v. Helvering*, 292 U.S. at 370 (a State is a liable "person" where its activity in selling liquor brings its conduct within area of concern of federal statute); *Georgia v. Evans*, 316 U.S. 159, 161-62 (1942)(state victim is a "person" under terms of the antitrust laws where harm it suffers from an antitrust violation is the same as that suffered by private persons); *Monell v. Department of Social Services of City of New York*, 436 U.S. 658, 690 (1978)(local governments are accountable "persons" under § 1983 where they violate the policies underlying that act). In light of the False Claims Act's broad-based objective of fighting *all* types of fraud against the United States, the cases cited in the Senate Report fully support application of the term to cover any state entity that engages in such misconduct. Indeed, this Court has concluded that States *must* be considered "persons" within the meaning of a statute if "its plain purposes preclude their exclusion." *California v. United States*, 320 U.S. at 585.

TSU also asserts that Senate Report No. 99-345 is irrelevant with respect to the meaning of "person" because it does not describe the 1986 amendments but is rather part of the Report's description of the history of the Act. First, as noted

above, in light of the broad remedial purposes that have always formed the foundation of the False Claims Act, Congress's interpretation in 1986 of the prior reach of the Act is entirely sound. More fundamentally, however, TSU is simply wrong in asserting that Congress's understanding of the scope of the Act at the time it substantially amended the statute is unimportant. In fact, that understanding and how Congress chose to act in light of it are controlling.

In 1986, Congress dramatically reworked the FCA so as to maximize its effectiveness in fighting fraud.[4] As part of its overhaul of the Act, Congress made adjustments to the very provision of the Act at issue here — which persons might be held liable for fraud — by narrowing the exclusion that had previously existed for members of the armed forces and by adding new exclusions (under some circumstances) for Members of Congress, members of the Judiciary, and senior executive branch officials. *See* Senate Report No. 99-345, at 39, 43; 31 U.S.C. § 3730(e). Although it obviously could, Congress did not provide any similar sort of exclusion for States. That decision is significant.

This Court has noted repeatedly that where, in making major changes to a statute, Congress does not seek to overturn an interpretation it knows the courts have applied to retained provisions of pre-existing legislation, it can be inferred that Congress has ratified the courts' interpretation of that aspect of the law. *See, e.g., Herman & MacLean v. Huddleston*, 459

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[4] Beginning in 1985 and ending in 1986, Congress undertook a major overhaul of the False Claims Act, covering both the substantive and the *qui tam* provisions." Robert Salcido, *Screening Out Unworthy Whistleblower Actions: An Historical Analysis of the Public Disclosure Jurisdictional Bar to Qui Tam Actions Under the False Claims Act*, 24 *Pub. Contract L.J.* No. 2 (Winter 1995), 250 (citations omitted). See also S. Rep. No. 99-345, *passim*.

U.S. 375, 385-86 (1983); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353, 381-82 & n.66 (1982). A similar inference has been drawn where, in substantially reenacting laws, Congress did not seek to overturn prior administrative interpretations of existing provisions. *See, e.g., Zemel v. Rusk*, 381 U.S. 1, 11-12 (1965). There is no reason to afford any less weight to Congress's decision to leave intact its *own* interpretation of the reach of a statute that it has comprehensively reviewed and has otherwise substantially amended.

When Congress overhauled the False Claims Act in 1986, it specifically addressed the definition of liable "persons" under the Act and reaffirmed the inclusive reach of that term. The intent of Congress in 1986 is manifest and controlling.

B. The Language and Statutory Framework and Executive Interpretation of the False Claims Act Demonstrate that "Person[s]" Include States.

The explicit reference to States and their political subdivisions in the Senate Report coupled with the broadly-stated purpose of the Act to reach *all* fraud against the United States are the clearest indication of congressional intent to hold States liable for any fraud they commit. They are by no means, however, the only aspects of the "legislative environment" of the False Claims Act that support that conclusion. Congress's intent to define "person" to include States is evidenced as well by the text and statutory framework of the Act.

As noted above, although the amended statute specifically provides certain categories of persons partial exclusions from liability, *see* 31 U.S.C. § 3730(e)(relating to certain *qui tam* actions), it does not include States or their political subdivisions among the excluded groups. Moreover, the narrow limitations

Congress placed on the exclusions it granted military personnel and certain high-ranking federal officials[5] to False Claims Act liability serve only to underscore the breadth of the Act. If Congress was willing, with only limited restrictions, to extend False Claims Act liability to members of the military, Members of Congress, members of the Judiciary, and senior executive branch officials in the Federal Government, there is no reason to presume that it intended to give States and their political subdivisions any greater leeway in defrauding the Federal Government.

Congress's intent to protect the federal treasury from *any* individual or entity that would advance fraud against the federal government is evident as well by its stated intent to include States and their political subdivisions among "employers" that could be held liable under the 1986 amendments for retaliating against their employees for taking lawful action to expose and remedy False Claims Act violations. *See* 31 U.S.C. § 3730(h). The Senate Report that accompanied the 1986 amendments explained that the definitions of "employee" and "employer" under the new whistleblower protection provisions of the FCA were meant to be *"all-inclusive"* and that the term "employers" was meant to include *"public* as well as private sector entities." S. Rep. No. 99-345, at 34-35 (emphasis added). *Cf. California v. United States*, 320 U.S. at 586 (holding that legislative history stating that the Shipping Act should apply "no less [to] public

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[5] The exclusion for members of the armed forces relates only to actions brought against them by other former or present members of the armed forces for claims arising out of service in the armed forces. *See* 31 U.S.C. § 3730(e)(1). Members of Congress and members of the judiciary are immune only from *qui tam* actions. *Id.*, § 3730(e)(2). And senior executive branch officials are granted an exclusion only with respect to *qui tam* actions that are "based on evidence or information already known to the Government when the action was brought." *Id.*

than [to] private owners" of waterfront terminals shows congressional intent to hold cities and States accountable under that act).[6]

The provision of the False Claims Act that was added in 1986 to authorize civil investigative demands ("CIDs") likewise confirms that Congress contemplated that States and their political subdivisions could be held liable for fraud under the statute. In 31 U.S.C. § 3733(l)(4), "person" is defined to include "any State or political subdivision of a State." While TSU has argued that the inclusion of the phrase "[f]or purposes of this section" at the beginning of the definitions set forth in § 3733(l) indicates that Congress intended the definition of "persons" to be different for CIDs than for the liability provisions of the Act, *see* TSU Pet. at 8-9, the legislative history of § 3733 shows that precisely the opposite is true.

In explaining the CID provisions that were added to the False Claims Act in 1986, Senate Report No. 99-345 notes that the provisions of § 3733 are "nearly identical" to CID authority that had already been granted the Antitrust Division of the Department of Justice under the Hart-Scott-Rodino Antitrust Improvements Act of 1976, and that it was intended that "the legislative history and case law interpreting that statute (15

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[6] While this Court held in *Atascadero*, 473 U.S. at 244, that — to effect any necessary abrogation of Eleventh Amendment immunity that might apply to individual's personal suits against States — Congress must clearly specify in the language of the statute itself its intent to affect such abrogation, no such restriction can properly be imposed on where Congress may effectively demonstrate its intent for purposes of deciding the broader question of whether Congress understood and intended to include state entities among those who could be liable to the United States for fraud under the False Claims Act. *See, e.g., Atascadero*, 473 U.S. at 253-54 (Brennan, J., dissenting)(majority in *Atascadero* creates, solely with respect to abrogating the Eleventh Amendment, a uniquely high hurdle for Congress to overcome in making its legislative intent manifest).

U.S.C. [§§] 1311-14), fully apply to this bill." *Id.*, at 33. Where Congress explicitly intends precedent interpreting one statute to control another, its decision to have the language in the newer bill track that of the older law as closely as possible is only prudent. Moreover, where Congress has announced such an objective, substantive variations from the prior statute that are introduced in the new law must be understood to indicate areas in which Congress intended to deviate from the standards that apply under the older statute. *See, e.g., Lorillard v. Pons*, 434 U.S. 575, 581-82 (1978)(noting importance in ascertaining legislative intent of examining where Congress incorporated the text of an older statute verbatim and where it made changes to the language that had been used in the prior legislation).

It is thus noteworthy that one of the ways that the CID provisions of the False Claims Act deviate substantively from their antitrust predecessor is their inclusion of States and States' political subdivisions within the definition of the term "person." Because antitrust CID law does not include state entities within its definition of a "person," Congress's specific decision to add States and their political subdivisions to definition of "person" in § 3733 *conforms* — rather than distinguishes — the use of that term in § 3733 to Congress's understanding of the term "person" in the liability provisions of the Act.[7]

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[7] The intended connection between the CID section of the False Claims Act and pre-existing antitrust legislation also clarifies why Congress included the phrase "[f]or purposes of this section" as an introduction to the definitions contained in § 3733. The phrase tracks the substantively identical passage introducing definitions in the chapter of the Antitrust Act dedicated to CIDs, *see* 15 U.S.C. § 1311, and thus simply carries forward Congress's stated plan to model the language and meaning of the FCA's new CID provisions wherever possible directly upon the language used in their antitrust predecessor.

An additional weakness of TSU's analysis regarding how to interpret Congress's decision to include a definition of "person" in the CID provisions of the False Claims Act is the fact that the term is used within those provisions to refer both to "person[s]" to whom CIDs might be served and to "person[s] . . . engaged in any violation of a false claims law." *See* 31 U.S.C. 3733(l)(2). Section 3733(l)(2) defines the term "false claims act investigation" as "any inquiry conducted by any false claims act investigator for purposes of ascertaining whether any *person* is or has been engaged in any violation of a false claims law." (Emphasis added.) Thus, read in its entirety, § 3733 indicates that States and their political subdivisions may be both recipients of CID requests and entities whose knowing submission of false claims to the United States can result in liability under the FCA. Such a reading of § 3733 is consistent with Senate Report No. 99-345 and with the broad remedial purpose of the Act to reach "all types of fraud, without qualification, that might result in financial loss to the Government." *Id.*, at 19; *Neifert-White Co.*, 390 U.S. at 232.

In contrast, to sustain TSU's position, this Court would need to conclude that Congress "got it wrong" twice — first, when it stated in the legislative history of the False Claims Act that it intended to include States among the "persons" whose fraud could be remedied under the Act, and again when it included the term "person" in its definition of a "false claims law investigation" under § 3733. Where rational alternatives exist, this Court should not adopt a reading of a statute that assumes that Congress was sloppy or ill-informed. In interpreting the law, it is the role of courts "to make sense rather than nonsense out of the *corpus juris*." *West Virginia University Hospitals, Inc. v. Casey*, 499 U.S. 83, 101 (1991).

Other aspects of the "legislative environment" demonstrate as well that Congress intended to include States in the definition of a "person." In addition to using the term to define who can

be held liable under the Act and to whom CID requests might be directed, the False Claims Act also uses the term "person" to define who is eligible to act as a *qui tam* plaintiff in such actions. No one denies States' right to act as *qui tam* relators under the Act. *See, e.g., U.S. ex rel. Woodard and State of Colorado v. County View Care Center, Inc.*, 797 F.2d 888 (10th Cir. 1986); *U.S. ex rel. Wisconsin v. Dean*, 729 F.2d 1100 (7th Cir. 1984); *see generally Stevens*, 162 F.3d at 204-05. Indeed, when the 1986 Amendments were drafted, Congress expressly acknowledged that fact and acted upon the request of the National Association of Attorneys General to overrule a lower court ruling that the States believed unduly restricted their ability to bring *qui tam* suits under the Act. *See* S. Rep. No. 99-345, at 12-13. "Identical words used in different parts of the same statute are intended to have the same meaning." *Commissioner v. Lundy*, 516 U.S. 235, 249 (1996). Having successfully urged Congress to strengthen their standing as "persons" for purposes of reaping the rewards of filing *qui tam* actions under the False Claims Act, it is disingenuous for States now to argue that the one and only time they should be excluded from the definition of a "person" in the False Claims Act is when the term is used to refer to those who may be held responsible for having defrauded the Federal Government.

A final factor favoring inclusion of States within the definition of "person" under the Act is the fact — evidenced by its intervention and position on this and other appeals — that the Department of Justice has consistently interpreted the statute in that manner. *See Cooper Corporation*, 312 U.S. at 605 (listing "executive interpretation of the statute" among the relevant considerations). To exclude States from the reach of the Act would dramatically undermine the ability of the United States to protect the federal treasury. A more sensible and sound reading of the statute is that Congress intended the False Claims Act to ferret out and fight fraud against the United States wherever it occurs.

C. Congress's Clear Intent to Include States as Liable "Person[s]" Under the False Claims Act Should Not Be Overridden.

In light of the overwhelming evidence that Congress intends False Claims Act liability to extend to the wrongdoing of States and state entities, the other arguments TSU offers in support of its position are entitled to no weight. It is irrelevant that, in passing the Program Fraud an Civil Penalties Act ("PFCPA") and the Anti-Kickback Act of 1986,[8] Congress elected to include a definition of "person" that does not include States. *See* TSU Pet. at 11. Although the PFCPA provides an administrative compliment to the False Claims Act, it was not intended to be co-extensive with it. *See* Senate Report 99-212, at 4-5, 34 (1985)(PFCPA procedures for adjudicating program fraud claims apply only to "small-dollar" claims; larger dollar claims "should be prosecuted in court" under the FCA). Thus, far from suggesting that courts are free to ignore Congress's stated intent that False Claims Act liability should extend to States, the fact that a narrower definition was added to the text of PFCPA merely confirms the more limited circumstances in which Congress believed reliance on administrative procedures was appropriate. Likewise, the fact that the definition of "person" under the Anti-Kickback Act is narrower than under

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[8] The PFCPA permits federal agencies that are victims of false claims to proceed administratively to recover damages where the amount in controversy is less than $150,000 and where the Department of Justice has elected not to pursue the matter in federal court under the provisions of the False Claims Act. *See* 31 U.S.C. § 380, *et seq.* The Anti-Kickback Act of 1986 makes it unlawful for government contractors to pay, solicit, or charge the Federal Government for kickbacks associated with the bidding or performance of federal government contracts *See* 41 U.S.C. § 51, *et seq.*

the False Claims Act provides no basis whatsoever to ignore the clear statement of congressional intent that States may be held liable under the broader provisions of the FCA.[9]

TSU argues that it is "not sound public policy to burden blameless taxpayers" with rewards under the FCA. TSU Pet. at 7-8. However, it would be poor public policy to allow the States to loot the Federal treasury at will. Fraud consumes as much as ten percent of the Federal budget, up to $100 billion annually. S. Rep. No. 345, at 3, 1986 U.S.C.C.A.N. at 5268. Federal grants to state and local governments more than doubled from $108 billion in 1987 to $228 billion in 1996. *U.S. ex rel. Zissler v. Regents of Univ. of Minnesota*, 154 F.3d 870, 874 (8th Cir. 1998), *citing* Bureau of the Census, U.S. Dept. of Commerce Publication FES/96, Federal Expenditures by State for Fiscal Year 1996 at 46, Table 11 (1997). The dollar cost of state fraud runs in the billions. The cost of exempting the States from the enforcement reach of the False Claims Act will continue to rise with the reality of increasing Federal grants to the States. Furthermore, fraud undermines public confidence in the Federal government. S. Rep. No. 345, at 3, 1986 U.S.C.C.A.N. at 5268. TSU protests that forcing state taxpayers to repay fraudulently obtained grants is against public policy. By implication, TSU's argument is that forcing the Federal taxpayer to subsidize their fraud is acceptable. Clearly, it is not. Allowing fraud to run unchecked is poor public policy in general.

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[9]Section 1 of the United States Code-Rules of Construction also requires no different result. The definition of "person" included in 1 U.S.C. § 1 is one to be used by default only where the context of a particular statute does not indicate otherwise. The Supreme Court has never applied that section to override a different definition of the term that the "legislative environment" shows Congress intended to apply with respect to a specific statute.

Nor can the reluctance TSU attributes to courts with respect to imposing punitive damages on States justify overriding Congress's intent to include them among the "persons" subject to the False Claims Act. As this Court has previously discussed at length, the multiple damages and civil penalty provisions of the False Claims Act are not "punitive damages" but rather "rough remedial justice." *United States v. Halper*, 490 U.S. 435, 446 (1989), *abrogated in other respects, Hudson v. United States*, 522 U.S. 1165 (1997); *see also United States v. Bornstein*, 423 U.S. 303, 314-15 (1976)(purpose of FCA remedies is to make government completely whole); *U.S. ex rel. Marcus v. Hess*, 317 U.S. 537, 551-53 (1943)(same). There is no basis to override Congress's manifest intent to treat state institutions the same as any other entity that knowingly defrauds the United States.

CONCLUSION

For all the reasons set forth above, TSU's Conditional Cross-Petition for Writ of Certiorari should be denied.

Respectfully submitted.

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